

[*Wells v. Kansas Gas & Electric Co.*](#), 85-ERA-22 (ALJ Dec. 5, 1986)

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U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 85-ERA-0022

In the Matter of

JAMES E. WELLS, JR.
Claimant

vs.

KANSAS GAS & ELECTRIC CO.
Respondent

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Before: GEORGE A. FATH
Administrative Law Judge

This matter arises under the provisions of Section 210 Energy Reorganization Act, as amended, 42 U.S.C. 5851 (the Act), and the regulations found at 29 C.F.R. Part 24.

After timely notice, a formal hearing of this case was conducted at Kansas City, Kansas. The parties appeared with counsel and were given full opportunity to present evidence, oral argument, and briefs on the issues. The hearing was public, and fully reported. This recommended decision follows the termination of the formal hearing and it is based on the entire record.

Statement of Proceedings

The respondent, Kansas Gas and Electric Company (KG&E) is the operator of a nuclear power station that went into service on or about December 5, 1984. The claimant, James F. Wells, Jr., was hired in April of 1983 during the construction of the facility, and worked as an electrical inspector for Volt Electric Company. He was one of fifteen quality assurance inspectors, who performed reinspection of the plant systems that were being turned over to KG&E.

On August 4, 1983, Wells was fired. He filed a complaint with the Secretary of Labor against KG&E alleging that he had been fired for engaging in a protected activity in violation of the Energy Reorganization Act 42 U.S.C. 5851 (the Act). The matter was adjudicated in favor of Wells, and KG&E was ordered to reinstate Wells to his former, or to a substantially equivalent quality assurance inspection position. Order of the Secretary of Labor, Exhibit C-3.¹ Wells obtained an enforcement order of the Secretary's remedial order in the United States District Court, which was affirmed in *Kansas Gas and Electric Co. v. Brock*, 780 F2d 1505 (10th Cir. 1985). Exhibit C-4.

Issues

I. What is the appropriate burden of proof the parties must bear in a wrongful discharge case?

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II. Was the claimant's termination of employment a violation of the provisions of 42 U.S.C. 5851?

III. Was claimant reinstated to his former or a substantially equivalent position, and, if not, was said failure in retaliation for his previous activities under the Act?

It is noted that KG&E still questions whether Wells was engaged in a protected activity at the time of the filing of his original complaint. KG&E Brief at 5. This question was raised and argued by KG&E before the Secretary and the Circuit Court, and decided on in favor of Wells. No more needs to be said on this matter.

Statement of Facts

Wells returned to work at KG&E in October of 1984. He was not given his position as quality assurance inspector, but, instead, he was assigned as an inspector trainee in a company warehouse. In this position, Wells inspected incoming equipment for quality and compliance with specifications. His findings were turned over to a supervising inspector, who reviewed the work and entered the final sign-off. With time and training, Wells was to become a regular inspector. Management gave two reasons for this assignment: the work that Wells had been doing in quality assurance was about complete, and there were no quality assurance inspection jobs in the electrical field; and, at that time, the company was having a problem at the warehouse and needed temporary help. Wells' work confined him to the receiving area of the warehouse during his working hours.

On his return to the plant, Wells was able to work, with the clearance he had on his previous job, but this was to change on the final walk-down (inspection) and receipt of nuclear material at the plant. Regulations of the Nuclear Regulatory Commission (NRC) require that employees in operating plants be screened for psychological fitness for "unescorted access". In anticipation of the change in security requirements, KG&E arranged to have Wells tested at the Wichita Clinic for his suitability to work in the nuclear plant.

Wichita Clinic is a facility offering general medical

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services. It has been used by KG&E for a number of years for the physical examinations, and the health needs of its employees. When the need for psychological testing arose, KG&E turned to Wichita for evaluations of the Minnesota Multiphasic Personality Index (MMPI) which were given at the plant. Initially, the tests were evaluated by Doctor Allen, a contractor with Wichita, but in about May of 1984, Wichita took on Doctor Charles L. Schalon, a clinical psychologist, as an associate. Walter Nelson, the general manager of administrative services at KG&E, invited Doctor Schalon to the plant, and provided him with a tour of the facilities.

Nelson arranged for Wells to take the MMPI on October 30, 1984, at the Wichita Clinic. Doctor Schalon administered, scored, and evaluated Well's test, and met with him for a discussion of the results. The test scores showed that Wells was overly defensive. This raised questions about the usefulness of the test protocol, and tended to skew the results. During the interview, Schalon discovered factual information, which seemed to confirm the excessive defensiveness shown in the MMPT: Wells questioned the test scores, and findings; he disclosed that he had been involved in four fights during his adult life; he had lost a stripe in the army during one altercation with a higher rank; and, he refused to allow Schalon to release his test scores before he consulted with his attorney.

Schalon was disturbed by Wells's attitude, and, on the whole, found him to be abrasive, hostile and offensive.

A confidential memorandum was prepared by Wichita over Schalon's name on October 30, 1984, the day of the test:

A review of our records indicated that a written psychological examination (MMPI) for the above named individual was scored by Charles L. Schalon, Ph.D., of the Wichita Clinic, in accordance with generally accepted and professionally recognized scoring criteria.

I certify that this individual's scores were within an unacceptable range to grant escorted (sic) access to Wolf Creek Generating Station.
ACCESS IS NOT RECOMMENDED.

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Exhibit C-18.

Wells repeated the MMPI test for Schalon on November 2, 1984, and he was interviewed on the 6th. The second test raised additional areas of concern for Schalon. He saw a profile that indicated the possibility of problems with drugs and alcohol (McAndrews score); and, he saw tendencies to brusqueness, abruptness, and antagonism (O score). Transcript at 419. After the interview, Schalon spoke with Nelson, and recommended that Wells be rehired provisionally. Nelson declined: Wells would have to be totally cleared for unescorted access to the plant or denied. Schalon felt that he would need personal background information on Wells. Nelson asked that he put his request in writing, which was done and an investigation proceeded.

At that time, KG&E had in its possession Wells' background information covering his entire life to August 1983. This had been obtained in connection with his first employment at the plant. Nevertheless, another investigation was conducted to up-date the information from 1983 to December 22, 1984. Exhibit D-9. These data were furnished to Schalon on January 3, 1985. The later data covering education, finances, health, alcohol-drugs, and community standing and were generally complimentary. Under the heading of criminal, there was a notation of a fine for a stop sign violation. Schalon, ignored the complimentary information, and selected information from the earlier background check on Wells that tended to support the conclusions he drew from the MMPI. In those reports he marked, and underlined parts that showed: one employer would not recommend rehiring; another found his job performance unsatisfactory; a college was unable to locate any record of his attendance; one investigator found there was conflicting information regarding his reliability and dependability; that he lost his temper occasionally, but was not violent.

On the other hand, there was information in the reports that Wells was honest, concerned for others, athletic, and in general, he enjoyed a good reputation in the

community. Most employers were satisfied with his work. And, all inquiries regarding drug and alcohol abuse were negative.

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Concurrent with the KG&E test, Wells was examined by Doctor Timothy S. Sippola, a clinical psychologist. He reported that he administered the MMPI test on October 30, 1984, and he interviewed Wells on the 15th of March, 1985. The interview disclosed: that Wells left one nuclear power plant after a dispute with management over quality control issues; he had never been denied clearance before; that he graduated second among fifteen in Army missile training school; that he was awarded outstanding trooper of the 82nd Airborne; that he was "busted" from E-4 to E-3 after verbal argument with a higher rank; that he was honorably discharged from the Army; that he had been charged with minor criminal offenses but (except for speeding) he was found innocent. In his report, Sippola noted that Wells was well dressed, neat, friendly, cooperative, and intelligent. He discussed the MMPI scores in detail, and concluded:

Mr. Wells' guardedness with Dr. Schalton may be viewed more as a reflection of his cautiousness about being interviewed when he had already been fired by Dr. Schalton's contractor. None of the defensiveness reflected in Mr. Wells' MMPI validity scales' scores taken for KG&E was in evidence on the administration of the MMPI given in my office on October 30, 1984.

Mr. Wells' tenacity in the face of opposition by management may be understood as the result of a healthy skepticism, of authority, a willingness and capacity to take a stand, even an unpopular one, optimism in the face of a challenge, and adherence to his own set of values to avoid the feelings of emptiness and despair that come to those who lack a sense of integrity and do not identify with values and principles beyond themselves. His superiors stands out as a quality to be valued, when his job necessarily entails the discovery and revelation of errors in design, sloppy workmanship, and failures to comply with regulations, all contrary to the short-term economic and timeliness interests of his employers.

In summary, the data and interview results do not warrant the denial of Unescorted Access clearance.

Exhibit C-9.

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After the final walk-down, around December 4, the nuclear operation began, and tighter security measures went into effect. Wells had no clearance for unescorted access. He was provided with an escort that accompanied him throughout his day at the plant. His escort met him at the plant entrance in the morning, and stayed with him all day even on trips to the lavatory. No one was happy with this arrangement, least of all the escort.

The regular employees resented having to devote time to escorting Wells, and because of the close attention given him by KG&E, their freedom of movement was also curtailed. Areas that had been open to the employees were now restricted.

There were other problems. On a number of occasions, Wells set off the alarm at a security checkpoint indicating that he was carrying contraband. A search of his clothing revealed nothing and he was passed through. There was no explanation for these incidents except Wells speculation that the equipment was new and needed adjustment. His escort was embarrassed by these events, and especially because of the annoyance Wells expressed to the guard. The escorts were also concerned and embarrassed by having to accompany to the on-site NRC office.

From the beginning, Wells' supervisor perceived disciplinary problems; He refused to sign a Volt Electric time card, and insisted that he was an employee of KG&E. Transcript at 550. On January 1, 1985, one of the supervisors prepared a list of charges against Wells based on the complaints of fellow employees, who were extremely concerned about what was happening at the warehouse. Transcript at 558. This document was "sent to file" and thereafter discussed at a meeting of supervisors. The consensus of that meeting was that Wells should be reprimanded, and if he did not take corrective action he should be terminated. A reprimand letter was prepared on January 2, 1985, and given to Wells either on that or the following day. Exhibit D-11. After the letter of reprimand was prepared, Wells was called to a meeting to discuss the charges. Transcript at 566.

At the meeting with his supervisors, Wells either denied the charges contained in the letter of reprimand, or he down-

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played them. Transcript at 561. Wells' specific comments could not be recalled, Transcript at 562, and the informants were not produced to support the charges.

There was evidence on only two of the charges given at trial. One of the employees described an incident in which Wells threw a utility knife after it slipped and cut his leg. This witness testified that the knife slammed against cabinets, and flew over his head. Other testimony by this witness, described Wells' disruptive behavior in the security search area.

It appears that the complaints against Wells were communicated to Schalon. On January 11, 1985, he wrote the closing paragraph on Wells' employment at KG&E:

On the basis of information on the above- named individual between dates of October 30, 1984, and January 3, 1985, it is my opinion that said individual should not be granted unescorted access to the Wolf Creek generating statemnt (sic).

UNESCORTED ACCESS IS NOT RECOMMENDED.

With so little evidence regarding the charges, and the discussions at the meeting between Wells and his supervisors, Wells was called by the Court to testify to the matters. He was questioned about the charges.

It was alleged that Wells had made threats against a supervisor. The threats were overheard by a leading inspector, and reported to the supervisor. Transcript at 557-558. Wells recalled the threat as "something to do with smashing the back of his face or smashing his face through the back of his head or something along that line". Transcript at 606. Wells denied making a threat.

Wells' version of the knife incident differed from that given by the company witness. He said that he cut his leg as he was opening a box with a utility knife. He threw the knife down onto the floor, and it slid under his desk and then under another desk. It did not leave the floor, and it was no danger to other employees. Transcript at 608.

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A former personnel department employee of KG&E, under general manager Nelson, testified to the hiring practices at KG&E during her employment, which ended in August, 1984. All pre-employment tests were administered by her at the plant including MMPI, utility helper, advanced helper and clerical tests. Transcript at 265. The MMPI test scores were sent to the Wichita Clinic, for evaluation. Nelson regularly had conversations with Doctor Allen regarding the tests. The witness testified that Nelson occasionally altered test scores to achieve hiring goals. Transcript 266, 274. She worked for Nelson at the time of the trial on the original discrimination charge brought by Wells. She testified that at the end of the hearing, Nelson was upset over the way KG&E witnesses testified. After a loud session with one of the witnesses, Nelson said to her: "The son of a bitch didn't say what he was to supposed, to say". And because of Reaves and Rudolf (sic) Wells looked good now. On cross examination, the witness admitted to being a friend of Wells. She resigned from KG&E because of harrassment and discrimination by Nelson.

Conclusions

Wells complains that he was fired on January 11, 1985, because he engaged in a protected activity reported safety violations during his previous employment at the KG&E plant in violation of section 5851 of the Act, which provides in part:

No employer, including a Commission licensee, an applicant for a commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation terms conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.] or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy

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Act of the 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.]

The employer maintains that he was terminated because he was not approved by the screening psychologist for unescorted access to KG&E's Wolf Creek Nuclear Plant. KG&E Brief at 7.

Another view, and the heart of the matter, is that KG&E did not comply with the orders for reinstatement of Wells, and more importantly it did not then, and does not now have any intention of reinstating him as ordered. A review of the evidence, and the inferences that flow from the evidence illustrates that the rehiring of Wells in October of 1984 was token compliance with the remedial order of the Secretary, and his firing on January 11, 1985 was pretextual.

Generally, in wrongful discharge cases involving protected activity, the respective burdens rest on the employee to show that he was terminated because he engaged in a protected activity, and, if this burden of persuasion is carried, the burden is passed to the employer to show by a preponderance of the evidence that he would have reached the same decision even if he had not been motivated by a desire to punish the employee for engaging in the protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S. Ct. 103 S. Ct. 2469 (1983); *Mt. Healthy School District v. Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977) The nexus between the protected activity and the discharge may be shown by evidence of circumstances that justify a retaliatory motive. *Love v. Re/Max of America, Inc.*, 738 F.2d 383 (10th Cir. 1984). Though the employer is free to discharge an employee for valid business reasons an inquiry must be made to determine whether the reasons are bona fide or pretextual. *Marathon Le Tourneau Co., Longview Division v. NLRB*, 699 F.2d 248 (5th

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Cir. 1983). A finding that the firing was pretextual, supported by persuasive evidence, is tantamount to a judgment that the employer has not marshalled convincing evidence to support its position. *NLRB Geri-Care, Inc.*, 697 F.2d 56 (2nd Cir. 1982).

KG&E represents that it maintained complete neutrality in regard to Wells testing, and it seeks to exculpate itself by saying that it acted solely on professional advice. This is not plausible, in view of the whole scenario case. There is a strong suspicion that there was more beneath the surface based on the close business relationships of the actors. As regards the personnel department of KG&E, there is persuasive evidence that management regularly exercised tight, and sometimes arbitrary control over hiring and firing at the plant. The resolution of the Wells problem was a matter of top priority at KG&E for years. It occupied top management. That this hostility should suddenly turn to neutrality is unbelievable.

The reinstatement of Wells ended a long period of litigation. KG&E vigorously resisted the order to reemploy Wells. In doing so it acted within its legal rights, but the persistence of its opposition provides some understanding for its posture when, at last, it had to act on the order of reinstatement.

The alleged inability of KG&E to place Wells in his former or substantially equivalent position as an inspector is tainted by the same pretextual devices as are found in his rehiring. It is incredible that suitable position, in conformity with the order, could not be found in a department of a thousand people. On the other hand, Wells placement in the warehouse is perfectly understandable in view of what KG&E intended to do.

The attention given to Wells, and, incidentally the other employees in the department on his account, was an irritation to him and the whole work force at the warehouse. Moreover, there was an atmosphere of hostility among some of his fellow workers. The feeling generated by management from the top down was that Wells was in an interloper. The effect of Wells presence at the plant from management's perspective is aptly described in the letter of reprimand: "By his

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actions and intimidations, caused as substantial deterioration in a previously harmonious work group". From the beginning, Wells was seen as a trouble maker, who had no place at the plant. Apart from being cauculated irritation to Wells, his close confinement to the warehouse also prevented the possibility of his seeing and complaining about safety violations. KG&E created working conditions that fostered discord among its regulars, and provided good reason for a less determined Wells to resign.

There appears to have been a plan to discharge Wells by the end of 1984. On New Year's Day, Wells' supervisor typed up a list of grievances as a foundation for disciplining him. These matters were not discussed with him, and he had not been warned, or cautioned about his behavior beforehand. To this point in time, there had been no complaints about Wells' work, and indeed, the disciplinary action focused on personal behavior, not work performance.

The charges were hastily gathered to produce reasons for discharging Wells. Only two of the incidents charged are supported by evidence: the knife throwing, and the disruptive behavior in the security search area. Wells' testimony is credited that the knife slid harmlessly along the floor after he threw it down without danger to his fellow employee. If Wells' irritation at the security search area was disruptive, it can be explained for his having to submit to a search of his person on three occasions for no apparent reason. The threat against a KG&E supervisor has no support in the evidence, and it is denied by Wells. The profane and socially offensive language is nowhere described or repeated in the evidence. The only testimony that touched on profane language was that of a witness whose sensitivities were offended by the word "damn". The testimonial evidence was general, and none of these incidents were associated with a time or place.

KO&E departed from practice when it tested Wells for access in the plant after the final walk-down. Routinely, the MMPI tests were given in the personnel office of the plant, and were forwarded to the Wichita Clinic for evaluation. In Wells's case, there were differences: he was sent to the Wichita Clinic; his test was supervised at the Clinic by the psychologist; and his appointment for the test was made by the manager of administrative services in the nuclear department,

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who closely monitored the test results. This departure from practice is seen as a method of assuring Wells' inability to qualify for unescorted access.

There is agreement that the first test taken by Wells at the Clinic was flawed, because of his defensiveness, which would tend to skew the evaluation. And, there is agreement that a retest was necessary. Nonetheless, on October 30, 1984 a confidential memorandum was issued on Wichita Clinic letterhead, over the name of the psychologist, stating that access was not recommended based on test results. This rush to judgment is all the more surprising in the light of intentions to retest Wells, and to supplement the test evaluation with a background investigation.

At the time of the request for additional background information was made to KG&E, it already had an investigative report on Wells' entire life to August 1983. Clearly, there was enough information in the earlier report to meet the needs of the psychologist. (He relied on that very data in making a second recommendation that Wells should be denied access.) Yet another report was ordered. The second investigation is viewed as a fishing expedition by KG&E for derogatory information that might give more weight to the predetermined discharge of Wells.

The investigation was completed on December 22, 1984. That data together with information regarding the complaints and disciplinary action taken at the plant prompted Schalon's second recommendation against unescorted access. As with the first, there were no reasons given, but it is clear from the record, the psychologist relied on the disparaging data found in the reports and the complaints, while he ignored the

information that tended to show good character. This recommendation had far a reaching effect: it amounted to a blackball for Wells in the nuclear industry. A question of such importance cannot be treated so summarily, and stand without the appearance of unfairness.

Doctor Sippola tested and interviewed Wells. His findings and opinions were set out in detail. The least he found was that Wells was no greater risk for the job he sought than the population at large. His reasoned report persuasively showed that wells should not have been denied unescorted access to

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the nuclear plant. He found Wells to be a person of intelligence, honesty, and pleasing personality. He concluded significantly (and perhaps the source of current difficulties), the he is a person of high standards, who will persist in doing what he thinks is right.

KG&E followed a management-by-objective philosophy. The disposition of the Wells' problem was not left to chance. Whether for affirmative action or other reasons, management would alter test scores, manipulate records, and, indeed, attempt to manage the evidence given in the original trial of this case. Moreover, none of the evidence given by KG&E's witnesses dispels the conclusion that Wells discharge (if he was ever hired) was contrived pursuant to customary management practices.

KG&F contends that it cannot be liable for Wells' discharge. It reasons that since it acted on professional advise, the decision to fire Wells is unassailable.

An analysis of the evidence, and the inferences arising from the circumstances of Wells discharge leads to the conclusion that Wells rehiring and firing by KG&E were pretextual, and it is so found. The attitude of KG&E toward him was one of hostility, carried over from his first discharge, fueled by conflict and litigation. In reemploying Wells, KG&E was responding to a court order from which there was no retreat. And, even though KG&E (not Volt) was ordered to reinstate Wells, it put him on the Volt time records. Though vehemently denied, there is a design apparent in this record that shows that KG&E picked Wells up only long enough to find reason to fire him, or force his resignation. This is not a case of dual motivation, but, instead, it is ease of single purpose: to discharge Wells for engaging in his protected activity in 1983. Moreover, his discharge, if effected, would be a guaranty against his protected activity in the future. The motive of KG&E in firing Wells was retaliatory.

The discourse in this case has focused mainly on his personality. The dissatisfaction with Wells at KG&E rests on his judgment and persistance in bringing safety violations to NRC. Unfortunately, the management of KG&E is also persistent in punishing him for the performance of his duty.

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Wells produced a prima facie case of discrimination and discharge by KG&E in violation of Section 5851. The evidence of the violation is persuasive and convincing. The reasons advanced by KG&E for Wells discharge and pretextual. But, even if the "but for" rule is applied, KG&E has not produced a plausible showing that Wells was fired for legitimate business reasons.

There is no evidence in the record to show to what extent KG&E complied with the order of the Secretary of Labor which was issued in June of 1984 as regards back pay, purge of records, posting of notices, and attorney fees and costs. it has been found that KG&E did not rehire Wells, or if he was rehired it was only for the purpose of finding cause to force his resignation, or fire him.

The order of the Secretary requiring KG&E to restore Wells to the same or a substantially equivalent position was not followed, and KG&E response that it had no job for Wells that was the same or substantially equivalent is unacceptable.

Inasmuch as there was no real compliance with the order of the Secretary, that order should be reaffirmed and brought current. Wells should be reinstated as of the date of his termination on January 11, 1985. He is entitled to back pay commencing on that date together with such increments in wages as he would have received if he had continued to work. On his reinstatement he should be placed in a job substantially the same (by whatever name) as he had when he was terminated in 1983. At that time, he was an electrical inspector in the field and he should be returned to that work even if training is required. A job in KG&E's warehouse is not suitable employment considering Wells work experience.

KG&E has developed a dossier on Wells that is biased and derogatory. Without correction, these data are damaging to Wells, and prevent his employment in the nuclear industry. This damage can never be completely undone, but it can be ameliorated to some extent by purging Wells' personnel record of derogatory information.

RECOMMENDED ORDER

It is recommended that the Secretary of Labor issue the

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following order:

A. That KG&E employ Wells to a position substantially equivalent to the position he had when he was originally terminated in 1983, that is, field electrical inspector, and moreover to provide whatever training might be required to fully qualify Wells for the position.

B. That KG&B pay Wells back wages, together with whatever wages increases were granted to employees similarly situated as electrical inspectors, from January 11, 1985 to the date of his reemployment pursuant to this order.

C. That KG&E expunge from Wells' personnel records Schalon's opinions and conclusions that Wells is unfit for unescorted access to the plant.

D. That KG&E grant unescorted access to Wells at the nuclear plant.

E. That KG&E pay Wells attorney fees and costs incurred in connection with this litigation after submission and approval by the Secretary.

Dated: December 5, 1986

GEORGE A. FATH
Administrative Law Judge

GAF:pac

[ENDNOTES]

¹ The claimant's exhibits are prefixed "C", and the respondents are designated "D".